FILED
MAR 5 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

EDDIE BARBOA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Alice Lorraine Dwyer Tilton
Pat E. Dwyer
First American Title Building
5959 Gateway West, Suite 206
El Paso, Texas 79925
915/779-3919
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether under the facts of this case, the Trial Judge failed to comply with the substantive and procedural requirements of Rule 11 (c) (1), Federal Rules of Criminal Procedure, 18 U.S.C. by not adequately determining that the Petitioner understood the nature of the charge to which the plea of guilty was made; and, therefore the Judgment of the United States District Court should be reversed and vacated and the Petitioner be allowed to plea anew?

II. Whether under the facts of this case, the Trial Judge failed to comply with the substantive and procedural requirements of Rule 11 (f), Federal Rules of Criminal Procedure, 18 U.S.C. by failing to determine prior to accepting the plea

of guilty that there was a factual basis for the plea; and, therefore, the Judgment of the United States District Court should be reversed and vacated?

III. Whether the Trial Court lacked subject matter jurisdiction because the record reflects that the building defendant was charged with conspiring to destroy under 28 U.S.C. Sections 371 and 844 (i) was not used in an activity affecting interstate commerce and there was fatal variance between the charge made in the Information and the proof offered at the evidentiary hearing; and, therefore, Petitioner's 28 U.S.C. Section 2255 motion to vacate sentence should be granted and the judgment of the U.S. District Court be reversed and vacated?

IV. Whether this Court pursuant to Supreme Court Rule 40 (1)(d)(2) and Rule 52 (b), Federal Rules of Criminal Procedure, 18 U.S.C. will notice a plain error not presented heretofore and reverse and vacate the judgment of the United States District Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

OFFICIAL REPORTS IN EARLIER PROCEEDINGS. 1

STATEMENT OF JURISDICTION 1

STATUES INVOLVED. 2

STATEMENT OF THE CASE 5

AGRUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT OF CERTIORARI. . . . 25

CONCLUSION. 55

APPENDIX A

Magistrates Proposed Findings and Recommended Disposition filed March 22, 1983. . . . . A-1

Order of U.S. District Judge Juan Burciaga for the District of New Mexico filed on April 19, 1983 denying Petitioner's Motion to Vacate Judgment and Sentence Under 28 U.S.C. Section 2255. . . . . A-4

Petitioner's Objections to Magistrates Proposed Findings and Recommended Disposition filed March 30, 1983. . . . . A-6

Page

APPENDIX B

Order and Judgment of the Tenth Circuit entered on October 17, 1983 . B-1

APPENDIX C

Order Denying Motion for Rehearing Decision of October 17, 1983-- entered December 14, 1983 . . . . . C-1

TABLE OF CASES, STATUTES AND RULES

CASES: Page

McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969) 26, 27, 28, 34

Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971). 54

United States v. Dayton, 604 F. 2d 931 (5th Cir., 1979) (en banc), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980) 30-33, 36-39

United States v. Grossman, 608 F. 2d 534 (4th Cir., 1979). 53

United States v. Mennuti, 487F. Supp. 539 (U.S. District Ct. E.D. New York, 1980), affirmed 639F. 2d 107 (2nd Cir., 1981) 53, 54

United States v. Punch, 709 F. 2d 889 (5th Cir., 1983) 30, 31

United States v. Schwanke, 598 F. 2d 575 (10th Cir. 1979). 53

United States v. Sweet, 548 F. 2d 198 (1977), cert. denied, 430 U.S. 969, 97 S. Ct. 1653, 52 L. Ed. 2d 361 (1977). 53

CASES:

Page

United States v. Wetterlin, 583 F. 2d 346 (7th Cir., 1978) 33, 34

STATUTES AND RULES: Page

18 U.S.C. Section 371
. . . . . .2, 6, 33, 42

18 U.S.C. Section 844(i)
. . . . . .2, 6, 33, 42, 45, 48, 51, 54, 55

28 U.S.C. Section 1254 (1)
. . . . . .2, 5, 25

28 U.S.C. Section 2255
. . . . . 1, 2, 4, 14, 20, 25

Rule 11 (c)(1) Federal Rules of Criminal Procedure, Title 18 U.S.C.
. . . . . 3, 20, 25, 26, 32, 34, 35

Rule 11 (f) Federal Rules of Criminal Procedure, Title 18 U.S.C.
. . . . . 3, 21, 26, 27, 36

Rule 52 (b), Federal Rules of Criminal Procedure, Title 18 U.S.C.
. . . . . 3, 55

Rule 40 (1)(d)(2), Rules of Supreme Court of the United States
. . . . . 3, 55

OFFICIAL REPORTS IN EARLIER PROCEEDINGS

The Order of the United States District Court for the District of New Mexico denying Petitioner's Motion to set aside his conviction pursuant to 28 U.S.C. Section 2255 and entered April 19, 1983, appears in the Appendix to this Petition (App. pp. A-4) and is not reported.

The Order and Judgment of the United States Court of Appeals for The Tenth Circuit also appears in the Appendix to this Petition (App. pp. B-1 to B-4). That decision is not yet reported.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on October 17, 1983. On December 14, 1983, the Court denied Petitioner's Petition for Rehearing (App. p. C-1).

The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1254 (1).

This case was brought in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. Section 2255 to vacate a judgment of conviction based on an alleged violation of 18 U.S.C. Sections 371 and 844(i).

STATUTES AND RULES INVOLVED

18 U.S.C. Section 371 provides in pertinent part as follows:

> If two or more persons conspire to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years or both. . . . .

18 U.S.C. Section 844(i) provides in pertinent part as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000.00 or both. . . .

Federal Rules Of Criminal Procedure, Rule 11 (c)(1), Title 18 U.S.C. in pertinent part provides:

> Rule 11, Pleas (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open court and inform him of, and determine that he understands, the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty, provided by law, if any, and the maximum possible penalty provided by law. . . . .

Federal Rules of Criminal Procedure, Rule 11 (f), Title 18 U.S.C. provides:

> Rule 11. (f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

Federal Rules of Criminal Procedure, Rule 52 (b), Title 18 U.S.C. provides:

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 40 (1)(d)(2), Rules of Supreme Court of the United States, effective

October 2, 1967, states in pertinent part:

> ". . . the brief may not raise additional questions or change the substance of questions already presented in those documents. Questions not presented according to this Court, at its option, may notice a plain error not presented."

Title 28 U.S.C. Section 2255 provides in pertinent part:

> A prisoner in custody under sentence of court... claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence...or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that has been such a denial or infringement of the constitutional

rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.....

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.....

Title 28, U.S.C. Section 1254 (1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

On February 25, 1982, while Eddie Barboa, hereafter referred to as Petitioner, was being detained in the local jail, an Information in Criminal Number 81-207 in U.S. District Court for the District of New Mexico was filed against Petitioner Eddie Barboa, which read as follows:

"The United States Attorney charges: Commencing on or about the 11th day of October 1981, and continuing thereafter until on or about October 24, 1981, in the State and District of New Mexico, the defendant Eddie Barboa and Robert Edwards, not a defendant herein, did unlawfully, knowingly and willfully conspire, combine, confederate and agree together with each other to maliciously damage and destroy by means of an explosive a building located at 3109 Coors Blvd., SW, Albuquerque, New Mexico, which building was used in an activity affecting interstate commerce." (Emphasis ours.)

"In furtherance of the said conspiracy and to effect object and purpose thereof, the defendant, Eddie Barboa, did commit among others the following overt act: 1. On or about October 24, 1981, the defendant Eddie Barboa furnished Robert Edwards a natural gas regulator. In violation of 18 U.S.C. §371 and §844 (i). Signed Don J. Svet, United States Attorney."

The charge was of a complex nature incorporating esoteric terms and concepts unfamiliar to the lay mind. The phrase, "which building was used in an activity affecting interstate commerce," has caused endless study, confusion, consternation not only in law libraries but also in many

courthouse libraries.

At the arraignment shortly thereafter on the same day, February 25, 1982, Petitioner was arraigned and plead guilty to the above quoted Information. On Page 3 of the Plea Transcript of February 25, 1982, the Court inquires into Petitioner Barboa's education and schooling, and that defendant has not had any narcotics or intoxicants in the last 24 hours, and about the waiver of grand jury, which was read into the record. On Page 4 of the February 25, 1982, Plea Transcript, the Assistant U.S. Attorney Don Svet files the waiver and the Information. Continuing on Page 4, the Court asks Petitioner Barboa's attorney, Ms. Lynn Allan, if she wishes the Information to be read and Ms. Allan waives the reading of the Information. The attorney and not the defendant waives the reading of the Information that Mr. Don

Svet, the Assistant U.S. Attorney has just filed.

Continuing on Page 4, Line 14 of the February 25, 1982, Plea Transcript, the transcript records the following:

The Court: "All right. Have you had ample time to discuss the information with your attorney, Miss Allan, Mr. Barboa?"

Mr. Barboa: "Yes sir I have."

The Court: "And are you satisfied with Miss Allan's representation?"

Mr. Barboa: "Yes sir, I am very satisfied."

The Court: "All right, sir. Now how do you plead--well, first Mr. Barboa, do you understand that it's also your right to have the charges set forth in the information tried to a jury, and that you are not under any compulsion to plead guilty to the information?"

Mr. Barboa: "Yes sir, I understand that."

The Court: "And it is your right to have the matter presented to a jury, and it's the burden of the government to prove you guilty beyond a reasonable doubt, and you stand innocent of the charges until you plead

guilty to the charge?"

Mr. Barboa: "Yes, Your Honor."

The Court: "All right, sir. And how--and also do you understand that you are going to be waiving your right to self-incrimination against--self-incrimination since I must ask you some questions regarding the charges to satisfy myself that your plea is a proper one?"

Mr. Barboa: "Yes, sir, I understand that."

The Court: "All right, sir. How do you plead to the information, Mr. Barboa?"

Mr. Barboa: "I plead guilty, Your Honor."

The Defendant Barboa has plead guilty at Line 15, Page 5 of the February 25, 1982, transcript before the Court has discussed the nature of the charges, "that he conspired to destroy a building by means of an explosive which building was used in an activity affecting interstate commerce," before the Court has explained the minimum and maximum penalties, before the Court has discussed the case through inquiry of the Defendant Barboa to establish that there is

a factual basis for the guilty plea. The Court did not undertake to ascertain whether there was any factual basis upon which the guilty plea could be appropriately based. The Court did not ask the Assistant U.S. Attorney to state the facts which the Government contended could be proven beyond a reasonable doubt. The Court did not ask the Government to make a statement of facts upon which the Government relied for proof of the Defendant's guilt at any time during the February 25, 1982, arraignment. Further, the Government offered no statments as to the nature of the charges or to establish a factual basis for the plea or to establish federal jurisdiction or the violation of a federal law.

After the Defendant Barboa has plead guilty at Line 15, Page 5 of the February 25, 1982, transcript on Line 16 of Page 5,

the Court continues as follows:

The Court: Mr. Barboa, do you understand that if the Court were to accept your plea of guilty to the information, that the Court could sentence you up to five years in prison and fine you a sum up to ten thousand dollars or both?"

Mr. Barboa: "Yes, Your Honor. I understand that."

The Court: "All right, Mr. Barboa. Tell me, in your own words, what you are pleading guilty to."

Mr. Barboa: "To the act of--could I say it in my own words?"

The Court: "Yes, sir, I would like you to."

Mr. Barboa: "Sometime in September, late September or October, a man approached me and asked me if he could use my license for the contract--I will make it as brief as possible--and in the course of events, he found out that I was having some financial problems and he asked me if I had insurance on my laundry, found out the laundry was there, he suggested that we burn it; that he knew how to do it and I could collect the insurance money. He said he would do it for a sum of money. I at first told him I was not interested, but later on, after, oh I would

say the fifth time he asked me or suggested it, I finally told him that I would be interested. Then he asked me to show him how it should be done, and later on asked me if I could get him a regulator, which I did sir."

The Court: "All right, sir. And this individuals name was Robert Edwards?"

Mr. Barboa: "Yes, sir."

The Court: "All right, sir. And you did provide him with a natural gas regulator?"

Mr. Barboa: "Yes, sir."

The Court: "Has anyone threatened or coerced you in order to get you to plead guilty to these charges?"

Mr. Barboa: "No, sir."

At Page 8, Line 6 of the February 25, 1982, Plea Transcript, the Court asks Defendant's Attorney, Miss Allen: "Miss Allan, from what you may have learned of the facts, are you satisfied that the government could prove a case against Mr. Barboa?" Miss Allan replies: "Yes, your Honor." Miss Allan concurs in Defendant Barboa's plea of guilty and the Court

beginning at Line 13, Page 8, states: "All right. The Court will accept and--well, first, the Court is satisfied that the plea of Mr. Barboa is a voluntary one and not the results of any force or threat or inducement other than a valid plea agreement, and the court will accept the plea of guilty to the information. (Emphasis ours.)

The Plea Arraignment Transcript contains only brief references to insurance and a natural gas regulator, and we may logically infer that Defendant Barboa and his attorney, Miss Lynn Allan and possibly everyone assumed insurance and natural gas was the "activity in the building that affected interstate commerce."

On March 8, 1982 in Criminal Number 81-207 in U.S. District Court For the District of New Mexico at the Sentence Hearing, page 10 of the February 25, 1982 Plea

Transcript the Defendant Barboa was sentenced to 3 years in prison consecutive to a five year sentence in another case. The Sentence transcript and the Pre-Sentence report do not mention any essential elements as to the nature of the charge or the factual basis for the charge other than insurance and natural gas.

On September 24, 1982 Petitioner Barboa filed a Motion to Vacate Sentence under Title 28 Section 2255 to be allowed to plead anew. On February 18, 1983, five months after the 28 U.S.C. 2255 Motion was filed an evidentiary hearing was held in U.S. Magistrate David Gallagher's court in Albuquerque on the 22 U.S.C. 2255 Motion to Vacate Sentence. At that Evidentiary Hearing Mr. Caesar Fulton, a registered professional engineer, testified at the Evidentiary Hearing Transcript pages 54-64 that all natural gas in the State of New

Mexico including Albuquerque, New Mexico is intra-state natural gas supplied by Gas Company of New Mexico, a subsidiary of Southern Union Gas and that all natural gas in New Mexico comes from natural gas wells in the State of New Mexico. Defendant Barboa and his attorney and probably others therefore were mistaken in their thoughts that Albuquerque, New Mexico natural gas was interstate natural gas. At the Evidentiary Hearing in an attempt to prove up insurance the government through Mr. Harry Hall, an insurance agent, attempted to prove up an insurance policy on the building at 3109 Coors SW, Albuquerque, New Mexico as alleged in the Information but instead introduced a zerox copy of the purported insurance policy that was illegible, unreadable, had ink notations all over not made by Mr. Hall, the insurance agent, and this alleged insurance

policy is labelled Defendant's Exhibit 2 at the back of the Evidentiary Hearing Transcript of February 18, 1983. On the face of the said insurance policy the address of the designated premises the last digit just before Coors Blvd. SW is an 8 not a 9. It would be a truly benevolent insurance company that paid a loss at 3109 Coors SW Albuqeruque, New Mexico when the address was 3108 or 8888 Coors SW Albuquerque, New Mexico or any other combination of numbers ending in 8 before the Coors Blvd. SW on the insurance policy. On direct examination by the government at Page 5, Lines 16 to 20 of the Evidentiary Hearing Transcript, Mr. Hall, the insurance agent, was asked, "Do you know where the companys place of business was? Answer by Mr. Hall: "Well the business that we insured was a laundromat on South Coors, approximately 34 to 3800 South Block

Coors." Further, while cross-examining Mr. Hall, Petitioner's Attorney, Pat E. Dwyer, at Line 19 on Page 16 of the Evidentiary Hearing Transcript began questioning Mr. Hall about Line four of Governments Exhibit 2 the alleged copy of the insurance policy. Question: "My question here where it says Line four 'designated premises', your holding it one foot away, can you read it? Can you? Answer on Line 22, Evidentiary Hearing Transcript Page 16, "Right". The Court Reporter at the Evidentiary Hearing somehow typed Attorney Dwyer's next question at Evidentiary Hearing Transcript on Page 40 at Line 7, Question: "What's the last digit before Coors? Its an 8, isn't it? Answer by Mr. Hall (not Mr. Dalton) on Page 40 Line 9, "Its 8; yes it is." Continuing on Page 40, Lines 10 through 15 when Asst. U.S. Attorney Don Svet stipulates an 8 is not a 9. Attorney Pat

Dwyer never asked witness Dalton (the washer and dryers and parts witness) about the 8 digit in Governments Exhibit 2, the insurance policy labelled Defendants Exhibit 2 at the back of the Evidentiary Hearing Transcript.

Thus, it can be said that Petitioner Barboa and his attorney as well as others could have been laboring under substantial misinformation as to the legal admissability of an insurance policy on the premises alleged in the Information 3109 Coors SW Albuquerque, New Mexico under the facts uncovered at the Evidentiary Hearing of February 18, 1983 almost one year after the Plea Arraignment Hearing of February 25, 1982. The Information in this cause was filed on February 25, 1982 during the Plea Arraignment Hearing, Plea Transcript P 4, Line 8, Mr. Svet, Asst. U.S. Attorney, "With the Court's permission, I file the

waiver and the original Information." The Court continued with the Plea Arraignment and Petitioner Barboa and his attorney had precious little time to go into a highly complex charge and in all probability under a great deal of misinformation concerning natural gas in Albuquerque, New Mexico that is really intra-state gas and the insurance policy that had the designated premises ending in the digit 8 just before the Coors not in a 9 as alleged in the Information. The Trial Court at the Plea Arraignment Hearing shifted the burden of explaining the nature of the charge and the factual basis for jurisdiction to Petitioner Barboa (after the Trial Court had already had Petitioner Barboa plead guilty) when the Trial Court, Plea Hearing Transcript, Page 5, Line 21 stated, "All right Mr. Barboa. Tell me in your words what you are pleading guilty to." Then

shortly thereafter in the Plea Hearing Transcript at Page 8, Line 6 the Trial Court asks Petitioner Barboa's attorney, Miss Allan, from what you may have learned of the facts, are you satisfied that the government could prove a case against Mr. Barboa? Miss Allan answers, "Yes Your Honor," and she concurs in the plea.

The Evidentiary Hearing in U.S. Magistrate Court was held on February 18, 1983 in response to the filing of Petitioner Barboa's 28 U.S.C. 2255 Motion to Vacate Sentence. At the Evidentiary Hearing the government concentrated on establishing jurisdictional facts. However, neither the U.S. Magistrate nor the Government addressed the two issues involving the Trial Court's failure to comply with the mandatory requirements (1) of Rule 11 (c)(1), which requires the court before accepting a plea of guilty to

address the defendant personally and inform the defendant of and determine that the defendant understands the nature of the charge to which the plea is offered; and (2) of Rule 11 (f), which requires that the court must determine prior to the acceptance of the plea, that there is a factual basis for the plea. The Federal Rules of Criminal Procedure, 18 U.S.C. Rule 11 issues were not addressed in the Magistrates Proposed Findings and Recommended Disposition even though non-compliance with Rule 11 had been raised in the Motion to Vacate Sentence. (Appendix A, Page A-1) And the United States District Court For the District of New Mexico in its Order entered April 19, 1983 (Appendix A, Page A-4) ORDERED that the findings and recommendations of the United Stated Magistrate are adopted by the Court and further ordered that the Petitioner's

motion to Vacate Sentence was denied.

At the Evidentiary Hearing the government introduced witness Michael Dalton, Manager of Williamson Washing Machine Supply Company, who allegedly sold used and new washers and dryers and parts to a Carrowsell Ltd. and the Government had witness Dalton bring and introduce several items lumped together as Exhibit 3 which included: (1) Check Number 1218 dated 3-9-81 on the Plaza National Bank for $1,500.00 dollars payable to Williamson Machine Co., and on the upper left hand of the check shows Carrousel Ltd. to be at 3108 Coors SW Albuquerque, New Mexico signed by a Laura M. Ingram and said check was returned marked insufficient funds (2) a series of invoices and letters all showing a "Carrowsell" at 3200 Coors SW Albuquerque, New Mexico as the address of the premises where all these washers, dryers, new and

used parts were billed to. At Page 43, Lines 12 to 19 of Evidentiary Hearing Transcript Petitioner Barboa's Attorney Pat Dwyer asks Mr. Dalton if he (Mr. Dalton) had ever gone to the building to check to see if any of the washers, dryers, parts, etc., had ever been installed at the building and Mr. Dalton nodded his head no--that he had not been out to the building to see if any of the items were ever installed at the building. So the Government's Exhibit 3 shows addresses of 3108 Coors SW, Albuquerque and 3200 Coors SW Albuquerque, not 3109 Coors SW Albuquerque as alleged in the Information.

Mrs. Inez Bailey testified at the Evidentiary Hearing, Evidentiary Transcript, Page 76 that she lives in the neighborhood of the laundromat and that the laundromat is approximately five miles from any interstate highway and that she never

saw any out of state cars at the laundromat. Mrs. Bailey further testified, Evidentiary Hearing Transcript Pages 75 and 76, that she was a frequent visitor at the laundromat because her daughter-in-law Ruth Bailey worked there part-time (Evidentiary Transcript Page 78) and Mrs. Inez Baily never saw any commercial items for sale at the laundromat like soda pop, laundry soap, bleach. Mrs. Bailey stated that the laundromat was patronized by people from the neighborhood, who came in to wash and dry their clothes.

Subsequent to the Evidentiary Hearing, the Magistrate filed on March 22, 1983 Magistrate's Proposed Findings and Recommended Disposition (Appendix A Page A-1) and recommended therein that Petitioner's motion be denied. On April 19, 1983, the Order of U.S. District Judge Juan Burciaga For the District of New

Mexico denying Petitioner's Motion to Vacate Judgment and Sentence Under 28 U.S.C. Section 2255 was entered (Appendix A, Page A-4). Petitioner filed an appeal to the United States Court of Appeals for the Tenth Circuit in No. 83-1551 and said Tenth Circuit Court entered an Order and Judgment on October 17, 1983 (Appendix B, Page B-1) affirming the Judgment of the United States District Court for the District of New Mexico. On December 14, 1983, the said Tenth Circuit Court entered an Order Denying Petitioner's Motion for Rehearing (Appendix C, Page C-1). This case is brought before this Honorable Court pursuant to Title 28 U.S.C. Section 1254 (1).

AGRUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

This petition brings before the Court two specific questions involving Federal Rules of Criminal Procedure. Rule 11 (c)(1)

and Rule 11 (f), 18 U.S.C.. The specific reasons Petitioner offers for setting aside his plea of guilty are first, that he was not sufficiently informed of the nature of the charges against him as required by Federal Rules of Criminal Procedure, Rule 11 (c)(1) and second that the trial Judge did not satisfactorily determine whether there was a factual basis for a finding of his guilt as required by Federal Rules of Criminal Procedure, Rule 11 (f), 18 U.S.C.. Petitioner's position is that failure of the U.S. District Court for the District of New Mexico to adequately inform Petitioner of the nature of the charges against him in guilty plea proceedings requires automatic reversal of his conviction on the guilty plea under McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). Furthermore, Petitioner agrues that the

trial court's noncompliance with Rule 11 (f) constitutes reversible error, entitling the Petitioner to plead anew as was held by the Court in McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969).

The Rule 11 guilty plea proceeding on which this appeal is based was conducted in contravention to this court's holding in McCarthy v. United States 394 U.S. 459, at 467 wherein this Court stated:

> "Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine 'that the conduct which the defendant admits constitutes the offense charge in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his

conduct does not actually fall within the charge.'"

A reading of the Transcript of the Rule 11 Plea Proceeding held before the United States District Court For the District of New Mexico in United States of America v. Eddie Barboa, Docket No. 81-207 CR (B) on February 25, 1982, plus a review of the Statement of The Case herein will lead to the irresistible conclusion that this Court's holdings in McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 are applicable to the facts in this case.

At Petitioner's Rule 11 Plea Proceeding, the record reflects that Mr. Svet, the Assistant U.S. Attorney filed the waiver of Grand Jury Indictment and the Original Information (Tr., page 4) and that the court asked Petitioner's attorney if she wished the Information read and Miss Allan answered: "No, we will waive the reading of

the Information." (Tr. page 4). There is nothing in the record to show that Miss Allan had been authorized by the Petitioner to waive reading of the Information. The transcript of the proceeding from page 1 through page 5 does not contain any language indicating that the Court, before accepting Petitioner's plea of guilty, determined that he understood the nature of the charge to which the plea was offered. While it is true that the court did address Petitioner and asked him questions about his education, etc., however, neither the judge nor the assistant District Attorney read the charge or an abbreviated version of the information. Instead of informing the Petitioner of the nature of the charge contained in the Information, the court shifted his burden of responsibility in this respect and asked Mr. Barboa: "Tell me, in your own words what you are pleading

guilty to." (Tr. page 5). The explanation given by Mr. Barboa in response to the Judge's question (Tr. pages 5-6) should have alerted the court that Petitioner was devoid of any understanding of an essential element of the offense charged, the interstate aspect of the case and was confused. The Petitioner's response should have alerted the court that he and the Petitioner were on different wave lengths. Petitioner states that the court failed to inform him of the elements of the offense to which he plead guilty. In United States v. Punch, 709 F. 2d 889 at 896 (5th Cir., 1983) the United States Court of Appeals for the Fifth Circuit held that failure of the court to inform Punch that the offense required "knowing" act constituted "entire failure to address a core concern" as such phrase was defined in United States v. Dayton, 604 F. 2d 931 (5th

Cir., 1979). In United States v. Punch 709 F 2d 889 at 896, the court reasoned:

> "Thus we are bound to conclude...that such a failure by the trial court to address any one or more of the rule's three core concerns as occurred in McCarthy requires automatic reversal."

In both Punch and McCarthy, the court failed to inform the defendant that the offense required a "knowing" act. In both Punch and McCarthy, this omission constituted an "entire failure to address a core concern" as that phrase was defined in United States v. Dayton, 604 F. 2d 931 (5th Cir., 1979) (en banc), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980).

In United States v. Dayton, 604 F. 2d 931 the U.S. Court of Appeals for the Fifth Circuit, en banc., clarified and defined how trial courts should conduct guilty plea hearings and suggested standards for appellate review of guilty plea

proceedings. In Dayton the court held that failure by the trial court to address any one or more of the rule's three core concerns (absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea) requires automatic reversal. Ibid., at 939.

In United States v. Dayton the court in discussing the Rule 11 (c)(1) requirement that the Judge personally inform the defendant of the nature of the charge and determine that he understand it, indicated that it could not state a "simple or mechanical rule" and offered the following guidelines:

> "....For simple charges.... a reading of the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice. Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explanation. In the case of charges of extreme complexity, an explanation of the elements of the

> offense like that given the jury in its instructions may be required....We can do no more than commit these matters to the good judgment of the court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." United States v. Dayton 604 F. 2d 931 at 938.

Petitioner pled guilty to an Information charging conspiracy to destroy, by means of an explosive, a building used in an activity affecting interstate commerce under 18 U.S.C. Section 371 and 18 U.S.C. Section 844 (i). For purposes of entry of a plea of guilty, a conspiracy charge is not a self-explanatory legal term so simple in meaning that a court may reasonably expect or assume that lay persons understand. United States v. Wetterlin, 583 F. 2d 346 (7th Cir. 1978). Considering the inherent complex nature and esoteric terms contained in both Section 371 and 844 (i) of Title 18 U.S.C., the court did not satisfy the requirements of

United States v. McCarthy, op.cit., and Rule 11 (c)(1) by asking the Petitioner if he had discussed the charges with his attorney and by asking Petitioner to tell him (the Court) in his own words, what Petitioner was pleading guilty to. (Tr., page 5). The explanation given by the Petitioner in response thereto as revealed in the record (Tr., page 6) should have indicated to the court that Petitioner did not comprehend the nature of the charge. The judge should not have assumed that Petitioner already knew and understood what the charges were.

In United States v. Wetterlin 583 F. 2d 346 at 351 (7th Cir., 1978) the Court observed in discussing Rule 11 (c)(1) that the colloquy between the judge and the defendant concerning the nature of the charges:

"...will vary from case to case, depending on the peculiar facts of each

> situation, looking to both the complexity of the charges and the personal characteristics of the defendant, such as his age, education, intelligence, the alacrity of his responses, and also whether he is represented by counsel...However, none of these characteristics can be a substitute for the explicit requirement of the rule that the judge personally, in open court, on the record, determine that the defendant knows and understands the nature of the charges." (Emphasis ours.)

Petitioner submits that a careful examination of the record made during his Rule 11 plea proceedings will reveal that in Petitioner's case, the district judge failed to comply with the requirements of Rule 11 (c)(1) and accordingly under United States v. McCarthy, op.cit., the guilty plea must be vacated.

Petitioner's position simply stated is that not only did he not comprehend what it was he was admitting but also mistakenly consented to be punished for a federal crime he did not commit. From the total circumstances of Petitioner's arraignment

in the Rule 11 proceeding, it is apparent that the Court did not make an adequate inquiry whether or not there was a factual basis to the offense alleged in accordance with the requirements of Federal Rules of Criminal Procedure Rule 11 (f), Title 18 U.S.C., which in its present form states:

> "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgement upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

As previously indicated the United States Court of Appeals for the Fifth Circuit, sitting en banc in U.S. v. Dayton op.cit. clearly explained and defined how trial courts should conduct guilty plea hearings. In addressing the Rule 11 (f) requirement that the judge be satisfied that there is a factual basis for the plea, the Court indicated that no simple mechanical rules can be stated and added:

"...the more complex or doubtful the situation..., the more searching will be the inquiry dictated by a sound judgment and discretion. . . .As for investigating the plea's factual basis, the present formulation of the rule lays down a test that is less clearly subjective than that of the 1966 rule. All the same, it retains its clear reference to the trial judge's subjective satisfaction, and we conclude that this remains the test for that judge. We must review the exercise of that discretion, however, if an apeal is taken from it, and we must do so on the record of the Rule 11 proceedings. It is therefore incumbent upon the judge to produce a record on the basis of which we can determine that his discretion was not abused." United States v. Dayton, 604 F. 2d 931 at 938 (5th Cir., 1979) (en banc), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980).

Petitioner states that the record of the Rule 11 proceeding in his case reflects that Petitioner's attorney, and not the Petitioner, waived the reading of the Information and the trial judge did not require narration by the Assistant U.S. Attorney, on the record, in the presence of the judge and defendant of what the Government meant to prove against the

Petitioner. Had the court in Petitioner's plea hearing conducted itself as the Court in Dayton, Petitioner would not be here seeking appellate relief. In United States v. Dayton, the district court read the charges contained in the Two counts of the Indictment, then asked Dayton whether he understood the charges and whether Dayton had any questions about the two counts. Later in Dayton's proceedings, the District Judge undertook to ascertain whether there was a factual basis upon which the tendered pleas of guilty could be based. The Judge in Dayton asked the prosecutor "to state the facts which the Government contended could be proven". United States v. Dayton 604 F. 2d 931 at 942. Before the prosecution stated the facts the District Judge made the following statement to Dayton and his co-defendants:

> "Now I want everyone here to listen to the facts upon which the Government

relies to convict you as to each Defendant. Bear in mind you are under oath and I want to know if they can prove these facts against you beyond a reasonable doubt." Ibid.

After the Government prosecutor had completed the statement relied for proof of guilt, the District Judge in Dayton addresed the defendants in the following words:

"Now each of you have heard the facts, that is the factual basis for which the Government relies to convict you as to the charges contained in each of the counts...."

"Now, I will ask you, are these facts true and can they be proved against you beyond a reasonable doubt?" Ibid.

Dayton responds affirmatively to the question propounded by the court. The appellate court reviewing the Dayton proceeding, found that the district court's conduct, as above described, established a factual basis for the plea in accordance with Rule 11 (f) and Dayton's conviction was affirmed. Ibid., P. 943.

In concluding its Dayton decision, the

Court indicated that mere ritual will not meet the requirements of Rule 11. It stated:

> "...What is necessary is that the trial court, given the nature of the charges and the character and capacities of the defendant, personally participate in the colloquy mandated by Rule 11 and satisfy himself fully that, within those limits, the defendant understands what he is admitting and what the consequences of that admission may be, as well as that what he is admitting constitutes the crime charged, and that his admission is voluntarily made," Ibid. page 943.

The Court indicated that if the trial court followed the above quoted guideline and if the record of that hearing reflects a "common sense" basis for agreeing, the trial court's judgment will not be disturbed.

We can only conjecture as to what facts were relied upon by the Government to convict the Petitioner because the record of Petitioner's plea hearing is devoid of such facts and neither the district court

nor the government prosecutor even read the Information thereof. We may observe, however, that one year after Petitioner's plea hearing, the Government had not quite developed its factual basis for the offense charged as reflected in the record of the Magistrate's Evidentiary Hearing. And even at the Evidentiary Hearing, the Government never developed any facts to support the element in the Information: "which building was used in an activity affecting interstate commerce." The natural gas turned out to be intrastate natural gas, the insurance policy introduced insured premises other than those described in the Information. The building described in the Information was a laundromat, whose activity was to provide the use of washers and dryers.

As to Question III presented by Petitioner Barboa for review of this Court

an analysis and review of the facts and evidence in this case as to "what activity the building at 3109 Coors SW Albuquerque, New Mexico affected interstate commerce," will show that the Trial Court lacked subject matter jurisdiction on the facts and evidence not on a long recital of reported cases on the subject of 18 U.S.C. 844 (i).

From the record in Petitioner Barboa's case there were no facts or evidence developed at the Plea Arraignment, the Sentencing Hearing, or in the Pre-Sentence Report to indicate what essential elements under 18 U.S.C. 371 (Conspiracy) and 844 (i) other than insurance and natural gas that the government was relying on to give the Court subject matter jurisdiction. After the Evidentiary Hearing of February 18, 1983 the U.S Magistrate Proposed Findings and Recommended Disposition filed

in this case March 22, 1983 did not make any specific findings of facts. One of the U.S. Magistrates Findings was stated as follows: "(4) At the Evidentiary Hearing the prosecution established that the building was one which was used in an activity affecting interstate commerce." (See Magistrates Proposed Findings and Recommended Disposition Appendix A, A-1). The U.S. Magistrate did not pin-point what activity at the building affected interstate commerce. Was it the insurance policy, the natural gas, the used washers and dryers or the new and used parts for the washers and dryers, was it the one time purchase of soap, bleach, etc.--what activity at the building affected interstate commerce? On March 29, 1983 Petitioner's attorney Pat E. Dwyer filed on March 30, 1983 Objections to Magistrates Proposed Findings and Recommended

Disposition and paragraph (2) reads as follows: "Movant-Defendant Barboa objects to Magistrates Proposed Finding (4) which states 'at the Evidentiary Hearing the prosecution established that the building was one which was used in an activity affecting interstate commerce'. How did the prosecution establish that the building was one which was used in an activity affecting interstate commerce? What specific evidence is U.S. Magistrate relying on in Proposed Finding (4) and why? How can Movant-Defendant Barboa file an objection to Proposed Finding (4) if we don't know what the basis is?" (See, Objections to Magistrates Proposed Findings and Recommended Disposition, Appendix A, A-6). Petitioner Barboa's objectives were overruled and the U.S. District Judge's Order filed April 19, 1983 adopted the Magistrates Findings and the U.S. District

Judge Order contained general terms and again this Order does not shed any light on what activity at the building affected interstate commerce. (See, U.S. District Court ORDER, Appendix A, A-4).

Petitioner's Appeal to the U.S. Court of Appeals For the Tenth Circuit was difficult for the reason that Petitioner Barboa did not know what elements the government was relying on to establish that a federal law was violated and that the U.S. District Court in his case had subject matter jurisdiction under 18 U.S.C. 844 (i). The Order and Judgment of the U.S. Court of Appeals For the Tenth Circuit entered October 17, 1983 (Appendix B, B-1) was a general order as well as the Order of the U.S. Court of Appeals For the Tenth Circuit entered December 14, 1983 Denying Motion for Rehearing entered December 14, 1983, (See, Appendix C, C-1) and neither order of

the U.S. Court of Appeals For the Tenth Circuit showed what "activity of the building affected interstate commerce." This is why Petitioner Barboa is placed in the difficult position under Question III to review the evidence and facts piece-meal.

At the Evidentiary Hearing Registered Professional Engineer Caesar Fulton, Evidentiary Transcript, Pages 54-64 testified all natural gas in New Mexico and particularly in Albuquerque, New Mexico is intra-state gas coming from natural gas wells located in New Mexico.

The copy of the insurance policy, Government's Exhibit 2 labelled Defendant's Exhibit 2, at the back of Evidentiary Hearing Transcript, shows a fatal variance between the address alleged in the Information 3109 Coors SW and the address on the insurance policy introduced by the

government. The insurance policy is mostly unreadable and shows a number 8 as the last digit number just before Coors indicating the address as any number ending in 8 not a 9 as in 3109 in the Information. See Mr. Hall's testimony in Evidentiary Hearing Transcript Page 16, Lines 19-22; and Mr. Hall's testimony on digit 8 that the Court Reporter for some reason typed at Page 40, Lines 7 through Line 15. Previously on direct examination by the government Mr. Hall, the insurance agent, testified that the building was located approximately 34 to 3800 South Block Coors. (See Evidentiary Hearing Transcript, Page 5, Lines 16 to 20.)

From the record in this case the only two subject matter jurisdiction elements under consideration by the Trial Court, the government, Petitioner Barboa and his attorney at the Plea Hearing, the

Sentencing Hearing and The Pre-Sentence Report were insurance and natural gas. That the court lacked subject matter jurisdiction on the facts and evidence based on natural gas and insurance in this case at the Plea and Sentence Hearings is evident.

In an attempt to create subject matter jurisdiction under 18 U.S.C. 844 (i) in this case an Evidentiary Hearing was held on February 18, 1983. The government introduced an invoice dated March 27, 1981 from Laun Dry Supply Company (Exhibit 6 at the back of the Evidentiary Transcript) showing one purchase of soap, bleach, plastic bags, roll towels, and roll towel dispenser in the total sum of $235.68 delivered to Carrousel Laundry at 3109 Coors SW, Albuquerque, New Mexico, a one-time purchase some seven months before the conspiracy period alleged in the

Information October 11, 1981-October 24, 1981. The government did not prove who owned and managed the laundromat on March 27, 1981. Dennis Williams, sales manager, of Laun-Dry Supply testified he did not know Eddie Barboa and he has never been to the Carrousel Laundry (See Evidentiary Transcript, Page 50, Lines 14 to 19.) Mr. Williams further testified that after the one sale on March 27, 1981 Laun-Dry Supply never did any more business directly or indirectly with Carrousel. (See Evidentiary Transcript, Page 53, Lines 9 through 13.)

The government at the Evidentiary Hearing called Witness Michael Dalton, manager of Williamson Washing Machine Supply, who brought several items (lumped together as Exhibit 3, at the back of the Evidentiary Hearing Transcript), which included (1) check number 1218 dated 3-9-81

drawn on Plaza National Bank for $1,500.00 payable to Williamson Machine Co., and on the upper left hand of the check shows Carrousel Ltd., to be at 3108 Coors SW, Albuquerque, New Mexico signed by a Laura M. Ingram, (2) a series of invoices and letters all showing a "Carrowsell" at 3200 Coors SW Albuquerque, New Mexico as the address of the premises where all these used washers and dryers, and the new and used parts went to. When Mr. Dalton was asked if he (Dalton) had ever gone to the building to see if any of the washers, dryers, parts, etc., had ever been installed at the building Mr. Dalton nodded his head no, that he (Dalton) had not been out to the building to see if any of the items were ever installed at the building. (See Evidentiary Hearing Transcript, Page 43, Lines 12 to 19.) So Governments Exhibit 3 show 2 addresses: 3108 Coors SW,

Albuquerque and 3200 Coors SW, Albuquerque, New Mexico not 3109 Coors SW Albuquerque as alleged in the Information.

Petitioner Barboa's other witness at the Evidentiary Hearing Mrs. Inez Bailey testified she never saw any out of state cars at the laundromat, that is approximately five miles from any interstate highway and that even though she was a frequent visitor at the laundromat because her daughter-in-law Ruth Bailey worked there part time she never saw any commercial items like soda pop, soap, bleach, etc., sold at the laundromat. (See Evidentiary Hearing Transcript, Page 75 through 78.)

Based on the record as developed by the Government in Petitioner's case, the Petitioner contends that the Government could not prove the necessary elements of 18 U.S.C. Section 844 (i) against

Petitioner beyond a reasonable doubt. The Government is leaning on a thin reed when it attempts to inject an interstate aura on a one time purchase from Laun-Dry Supply of soap, bleach, plastic bags, roll towels, and roll towel dispenser, which transaction occurred some seven months prior to the alleged conspiracy. The record further shows that Dennis Williams, Manager of Laun-Dry testified that he had never been to the laundromat made the subject of Petitioner's prosecution and that after the one sale on March 27, 1981, Laun-Dry never did any more business either directly or indirectly with Carrousel Laundry. (Evidentiary Transcript, Page 50, Lines 14-19 and Page 53, Lines 9-13). The Government's factual basis for the charge contained in the Information was undermined by the testimony of Witness Inez Bailey, who stated that she visited the laundry

regularly because her daughter-in-law worked there and she never saw any commercial items like soda pop, soap, bleach, etc., for sale at the laundry. (See Evidentiary Hearing Transcript, Page 75, Lines 6 to 24, and Page 76, Lines 2 to 24.)

Petitioner submits that even under the holdings in United State v. Sweet 548 F. 2d 198 at 202 (7th Cir. 1977) cert. denied, 430 U.S. 969, 97 S Ct. 1653, 52 L. Ed. 2d 361; United States v. Schwanke, 598 F. 2d 575 (10th Cir., 1979) and United States v. Grossman, 608 F. 2d 534 (4th Cir., 1979), the facts in this case do not meet the "de minimis effect on commerce" criteria.

The Court in United States v. Mennuti, 487 F. Supp. 539 (U.S. District Court, E. D. New York, 1980) stated that Section 844 (i) exercises only the full extent of

Congress's commerce clause jurisdiction over property, by extending to all property having a de minimis connection with interstate commerce. The court in Mennuti stated:

> "...analysis must begin by recognizing that under Perez, Section 844(i) is a category 2 statute, regulating 'persons or things in commerce.' Only then can the holdings of Sweet, Schwanke, and Grossman be properly set forth as establishing that (1) 844(i) exercises the full jurisdictional reach constitutionally permissible under the commerce clause over interstate property; and (2) Section 844 (i) extends to any property having a de minimis connection with interstate commerce. United States v. Mennuti, 487 F. Supp. 539, at 544; affirmed by 2nd Cir., 1981, 639F. 2d 107. The court referred to Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971)

The U.S. Circuit Court of Appeals for the Second Circuit affirmed the decision of the U.S. District Court in United States v. Mennuti, 639F. 2d 107 (2nd Cir. 1981) and concluded as follows:

> "We hold only that Congress did not choose, as the Government contends, to

make nearly every bombing in the country a federal offense." Ibid. 639 F. 2d 107, at 113.

The Government did not establish the vital interstate nexus required by Section 844 (i) in Petitioner's case.

Inasmuch as this Court has power to review by virtue of the authority hereinbefore cited, Petitioner asks the Court to review the entire record of proceedings and pursuant to Rule 52 (b), Federal Rules of Criminal Procedure, Title 18, U.S.C. and Rule 40(1)(d)(2), Rules of the Supreme Court, to address itself to the issue of whether or not there are meritorious grounds for appeal reviewing the entire record and taking notice of any plain errors not presented heretofore that affect substantially the rights of this Petitioner.

CONCLUSION

For the reasons set forth above, it is

respectfully submitted that this Petition for Writ of Certiorari should be granted. Furthermore, an overwhelming number of defendants charged with violations of federal law enter pleas of guilty, thereby affording some relief for the bulging federal court dockets while simultaneously taking an important initial step toward their own individual rehabilitation by judicial admission of their guilt. Although we all may be concerned that the wheels of justice move with dispatch, we must be ever alert that these same wheels do not trample on the fundamental rights of the accused. Review of this case affords this Honorable Court a splendid opportunity to establish some guidelines for the judges in the trial courts to follow in Rule 11 proceedings to assure the protection of the fundamental procedural and substantive safeguards accorded the accused by Rule 11,

in its most recent amended form, effective December 1, 1975, comprising approximately 1,000 words, arranged in 20 paragraphs and subparagraphs. Establishment of Rule 11 guidelines or tests will protect the accused and hopefully will diminish the number of piece-meal appeals from Rule 11 proceedings.

Respectfully submitted,

Alice Lorraine Dwyer Tilton
Pat E. Dwyer
First American Title Building
5959 Gateway West, Suite 206
El Paso, Texas 79925
915/779-3919

Attorneys for Petitioner

A-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDDIE BARBOA,

Defendant-Movant,

vs.

Criminal No. 81-207
Civil No. 82-1100-JB

UNITED STATES OF AMERICA,

Respondent.

MAGISTRATE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION

FINDINGS

(1) Defendant, presently confined in a federal correctional institution as a result of his plea of guilty and sentence by this court, seeks relief under Section 2255. He has retained counsel. An evidentiary hearing has been conducted and briefs have been filed. A transcript of the plea proceedings have been admitted into evidence.

(2) Defendant pled guilty to an

Information charging conspiracy to damage or destroy a building which was used in an activity affecting interstate commerce.

(3) Defendant claims he should be entitled to withdraw his plea for the reason that at the plea proceedings the Government did not establish that the building was used in an activity affecting interstate commerce.

(4) At the evidentiary hearing the prosecution established that the building was one which was used in an activity affecting interstate commerce.

(5) The defendent waived his presence at an evidentiary hearing, and otherwise waived the presentment of his testimony by any other means. At the hearing the Magistrate permitted his counsel an election whether to present the defendant's testimony live and a

continued hearing, by deposition, or by written interrogatories, the Magistrate to be notified of his decision by March 9, 1983. This date was extended subsequently until March 15, 1983. The Magistrate received a letter from counsel dated March 17, 1983 containing evidentiary material and a further agrument. It was silent concerning how the testimony of the defendant was to be presented.

RECOMMENDED DISPOSITION

That the Motion be denied.

S/ David Gallagher
UNITED STATES MAGISTRATE

A-4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDDIE BARBOA,

Defendant-Movant,

vs.

Criminal No. 81-207
Civil No. 82-1100-JB

UNITED STATES OF AMERICA,

Plantiff-Respondent.

O R D E R

THIS MATTER having come before the Court on the findings and recommendations of the United States Magistrate, and objections to the findings and recommendations having been filed, the Court having made a de novo determination of those portions of the Magistrate's findings and recommendations objected to;

IT IS HEREBY ORDERED that the findings and recommendations of the United States Magistrate are adopted by

the Court.

IT IS FURTHER ORDERED that the motion be denied and this action be, and it hereby is, dismissed with prejudice.

S/ JUAN BURCIAGA
United States District Judge

A-6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDDIE BARBOA,

DEFENDANT-MOVANT,

vs. Criminal No. 81-207
Civil No. 82-1100-JB

UNITED STATES OF AMERICA,

RESPONDENT.

OBJECTIONS TO MAGISTRATES PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Comes now Defendant-Movant EDDIE BARBOA and files these objections to Magistrates Proposed Findings and Recommended Disposition and would respectfully show the Court the following:

(1)

Defendant-Movant objects to Magistrate Proposed Finding 3 for the reason that it does not go far enough in addressing Movant-Defendants Barboa's

Motion Under Title 28 U. S. C. Section 2255 in that Proposed Finding 3 makes no proposed finding whether United States District Judge Juan Burciaga at the plea proceedings on February 25, 1982 complied with Federal Rule of Criminal Procedure Rule 11(f) which states, notwithstanding the acceptance of a plea of guilty, the Court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea. Did Judge Burciaga establish a factual basis at the plea proceedings? A transcript of the plea proceedings has been admitted into evidence and it is absent any factual basis to support the guilty plea and Movant-Defendant Barboa is entitled to a finding on this issue.

Secondly, did the office of the U. S. Attorney at the Plea Proceeding on

February 25, 1982 offer any evidence to support the information and establish a factual basis for the plea of guilty? The plea proceeding transcript clearly shows that not only was no evidence offered by the U. S. Attorneys office to establish a factual basis but no evidence was presented to establish federal jurisdiction in the case. Movant-Defendant Barboa incorporates by reference herein for all purposes their Brief in Support of Post Conviction Collateral Attack filed in this cause on September 24, 1982, and Attorney Pat E. Dwyer's letter to U. S. Magistrate David Gallagher dated March 17, 1983. Movant-Defendant Barboa is entitled to a finding on these three points.

(2)

Movant-Defendant Barboa objects to Magistrates Proposed Finding Number (4)

which states "At the evidentiary hearing the prosecution established that the building was one which was used in an activity affecting commerce." How did the prosecution establish that the building was one which was used in an activity affecting commerce? What specific evidence is U. S. Magistrate Gallagher relying on in Proposed Finding (4) and why? How can Movant-Defendant Barboa file an objection to Proposed Finding (4) if we don't know what the basis is? Movant-Defendant Barboa incorporates by reference for all purposes Attorney Pat E. Dwyer's letter to U. S. Magistrate Gallagher dated March 17, 1983 especially pages 2 and 3 and the evidence, facts, and cases cited therein, a copy of said letter is attached.

(3)

Of course we object to the

Recommended Disposition based on the transcript of the Plea Proceedings of February 25, 1982, the transcript of the Evidentiary Hearing of February 18, 1983, and the various briefs, letters, citations, and cases cited by Movant-Defendant Barboa's attorney Pat E. Dwyer.

Respectfully submitted,

S/ Pat E. Dwyer

Pat E. Dwyer
Attorney for Movant-Defendant
Eddie Barboa
First American Title Building
Suite 206
5959 Gateway West
El Paso, Texas 79925
Area 915-779-3919

CERTIFICATE

I certify that a copy of the foregoing Objections were mailed to opposing counsel of record this 29th day of March, 1983.

S/ Pat E. Dwyer

Pat E. Dwyer
Attorney for Movant-Defendant
Eddie Barboa

B-1

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 83-1551
	)	(D.C. No. 81-207)
v.	)	(D. N.M.)
EDDIE BARBOA,	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed.R.App.P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This is an appeal from an order denying defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255.

On February 25, 1982, defendant pled

guilty to an information charging conspiracy to destroy, by means of an explosive, a building used in an activity affecting interstate commerce under 18 U.S. C. § 371 and 18 U.S.C. § 844(i).

In his motion to vacate sentence, defendant claimed that the trial court lacked subject matter jurisdiction because the building defendant conspired to destroy was not used in an activity affecting interstate commerce. Moreover, defendant contended that the trial court accepted his guilty plea without establishing, as a factual basis for the plea, that the building was used in an activity affecting interstate commerce.

Magistrate Gallagher conducted an evidentiary hearing on these issues on February 18, 1983. He found that the building was used in an activity affecting interstate commerce. Defendant

failed to prove otherwise.

We also conclude that the trial court complied wih Fed.R.Crim. P. 11(f). That rule requires that a court satisfy itself through inquiry that there is a factual basis for the guilty plea before entering judgment. The record shows that the factual basis for the plea was established through the trial court's inquiry of the defendant, defense counsel and through information contained in the presentence report.

From our review of the record, we find no error in the district court's denial of defendant's 28 U.S.C. § 2255 motion to vacate sentence. See 10th Cir. R. 17(b).

The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

The mandate shall issue forthwith.

HOWARD K. PHILLIPS, Clerk

By S/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

C-1

NOVEMBER TERM - December 14, 1983

Before Honorable Monroe G. McKay, Honorable James K. Logan anad Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals

UNITED STATES OF AMERICA	)	
Plantiff-Appellee,	)	
v.	)	No. 83-1551
EDDIE BARBOA,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of petitioner's motion for rehearing, which we construe as a motion to recall the mandate.

Upon consideration thereof, the motion is denied.

S/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

END OF DOCKET